

ARIZONA SUPREME COURT
Committee on the Impact of Wireless Mobile Technologies and Social Media
on Court Proceedings

Minutes
April 6, 2012

Members present:

Hon. Robert Brutinel, Chair
Hon. Janet Barton
Hon. James Conlogue
Hon. Dan Dodge
Hon. Margaret Downie
Hon. Michael Jeanes,
by Chris Kelly, proxy
Hon. Eric Jeffery
Hon. Scott Rash

Members present (cont'd):

Karen Arra
David Bodney
Joe Kanefield
Robert Lawless
Robin Phillips
Marla Randall
George Riemer

Members not present:

Kathy Pollard

Guests:

Jennifer Liewer
Cindy Trimble
Theresa Barrett
Alicia Moffatt

Staff:

Mark Meltzer
Ashley Dammen
Julie Graber

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1. Call to Order; welcome by the Chair; introductions. The Chair called the first meeting of this Committee to order at 10:05 a.m. The Chair welcomed the members and thanked them for their participation. He noted that the Committee would review issues, including jurors' access to materials that are not in evidence and the presence of cameras in the courtroom, which are not unprecedented but that are again timely because of the development of widespread wireless internet access and ubiquitous video recording devices. The Chair then asked the members to review proposed rules for conducting Committee business.

Motion: A motion was made and seconded that the proposed rules for conducting Committee business be adopted, and the motion carried unanimously. **Wireless 12-001**

The Chair provided an outline of Administrative Order 2012-22. The Chair added that the Chief Justice appreciates the members' interest in addressing the innovative subjects before this Committee. The Chair noted that the Committee is required to submit a report of its recommendations to the Arizona Judicial Council by November 30, 2012. The Chair briefly summarized his judicial service for the members, and each of the members, staff, and others in attendance introduced themselves.

2. Overview of wireless mobile technology and social media. The Chair then invited Jennifer Liewer, the Supreme Court's public information officer, to address the Committee.

Ms. Liewer emphasized the goals of achieving justice in court and protecting the integrity of the judicial process during what has been called a "social media revolution." She proceeded to play a YouTube video with that title. The video stressed a fundamental shift over the past decade in the way people communicate because of the new social media. The shift occurred with the

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introduction of i-Pods (2001), Facebook (2004), YouTube (2005), Twitter (2006), i-Phones and Kindles (2007), and i-Pads (2010). This technology has allowed a number of bulky items (such as a telephone, a computer, and audio and video players) to be combined into a single, compact device. Many of these devices also have the capacity to take high quality photographs and digital videos.

The most popular social media sites are free of charge, open rather than private, and vast. Ms. Liewer noted that on Twitter, the quality of the content can be more significant than the initial number of followers, and a single tweet can result in quick and global distribution of a popular message or photograph.

Ms. Liewer outlined positive changes brought about by the new technology and social media. The new devices eliminate the need for litigants to take boxes of paper to the courthouse. Jurors can continue to stay in touch with home and work during jury service. Judges now use i-Pads to review briefs and court records. A recent attorney discipline hearing in Arizona was streamed live on-line to 14,000 viewers, and many followed live tweets of the proceeding from a reporter in the hearing room. A Pima County judge recently allowed a political action group, pursuant to Supreme Court Rule 122, to make a video of a court proceeding for posting on YouTube.

There are also negative implications arising from the use of new technology. Citizen journalists in the courtroom may not accurately report the proceeding. Although Ms. Liewer noted studies have indicated jurors will follow applicable rules when given proper instructions, access by jurors to outside sources of information or opinions may continue to interfere with case outcomes. In response to a question, Ms. Liewer stated that rather than being overwhelming, the variety of new media allows her to better manage time and to stay more engaged with others, and that her use of the new media has become second nature.

Ms. Liewer concluded by noting a risk of inaction. She said that social media is here to stay, and courts must consider and manage its impact on judicial proceedings.

3. Roundtable discussion of member experiences with new technology. Ms. Arra, the Public Information Officer for the Maricopa County Superior Court, stated that the new technology has allowed her to provide increased amounts of information about judicial rulings and court activity to large numbers of media and citizens who are not physically present in the courthouse. She provides breaking news in high profile cases on Twitter, and detailed information on programs such as specialty courts on Facebook. Ms. Arra said that the public now has an expectation that she will cover more rather than just a few courtrooms, and provide even more public relations information. Providing content will continue to take more of her time because individual judges do not post or tweet on the court's social media sites, but instead route public information through her office.

One trial judge said that reporters may tweet from her courtroom, and that she has experienced very few problems with the professional media. She noted that the press has an interest in following court rules because they will repeatedly return to the courthouse. Individuals, on the

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other hand, usually are in the courthouse concerning a single case and are less interested in abiding by the rules. Her court deputy has made her aware that some court visitors have taken photographs in court, and she has requested that a visitor delete a photo on at least one occasion. She is concerned about clandestine audio recording of court proceedings, which may be difficult to detect. She shared an experience about a juror who brought a dictionary into the courtroom so she could correctly spell technical terms in her notes of trial testimony. She requests court visitors to turn off their cell phones in the courtroom, but this is to avoid disruption rather than to prevent messaging.

Another judge mentioned that in a case involving gang violence, she ordered that a friend of the defendant stop taking photos of prospective jurors, and the defendant later claimed on appeal that this order caused jurors to be biased. Another member related that a family member took a photograph of a defendant in a jail uniform; a judge ordered deletion of this photo. It is challenging to determine if members of the public are taking photographs in courtrooms where there may be less security, or in any crowded courtroom.

On the subject of social media, a judge mentioned a post-trial motion that contended a juror was untruthful during voir dire based on information counsel later observed on Facebook. Another judge mentioned that he spends considerable time during voir dire on the subject of internet use by jurors; he has excused jurors who have stated that they would prefer on-line information over evidence presented in court, or who have acknowledged that they are so accustomed to internet use that they would not refrain from doing on-line research during trial. A judge raised a question about how frequently he must monitor social media and other websites to assure that his name is not used inappropriately on-line.

None of the members advocated that jurors or other court visitors surrender their electronic devices at the courthouse. Not only would it deprive jurors of the ability to contact work and family; it would also be logistically complex for court staff to maintain and to return hundreds of devices daily. Moreover, separating jurors from their devices in court would not affect the ability of jurors to do internet research on a case once they left the courthouse. The members preferred that judges give jurors instructions that are more meaningful. One judge noted that jurors may do internet research because they might not receive the assistance they request from the court. For example, if a jury asks the court to define a word, a judge's instruction that the jury should give the word its "ordinary and common meaning" may not be particularly helpful.

A number of courts have electronic recording systems, including "FTR" ["for the record"]. FTR recordings requested by members of the public have been subsequently posted on YouTube. The public can edit FTR videos of court proceedings and the on-line versions of these videos can therefore be misleading. In some courts, judges also utilize a court reporter in the event portions of the FTR are inaudible, and both the transcript and FTR are official records. Other courts use the recording only to assist the clerk, and it is not an official record. In municipal courts, parties have requested to record a witness' testimony or a court ruling on an i-Phone, and some but not all judges permit this. Judges universally enforce other rules, particularly the rule about not recording images of jurors.

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Parties often present evidence in protective order proceedings of harassment or threats posted on social media sites or received on a smart phone, and parties occasionally want to present video evidence of an accident scene recorded on an electronic device. Certain court websites provide instructions to parties to transfer electronic evidence to a disc or other medium so the court does not need to take the device into evidence.

Ms. Kelly advised that the Maricopa County Superior Court Clerk receives about a thousand electronic filings daily in civil cases. Some filers mistakenly believe that a document is processed at the same instant it is filed, but processing still takes time. A few judges prefer to have paper documents in complex cases. The Clerk will be implementing an “e-file foundation” in a few months that will make electronic filing quicker, cleaner, and easier to navigate.

Mr. Kanefield discussed how i-Pads have affected his practice. He uses his i-Pad for remote tracking of client matters, documents, and other information. He can highlight, bookmark, and annotate documents, and he sends messages and documents to his office for more extensive editing. One of the State Bar’s strategic initiatives this year is to familiarize attorneys with new technology and to increase its use by the legal profession.

Although he has personal preferences for handwriting and for paper, Mr. Bodney advised that the State Bar’s initiative is well taken. Mr. Bodney is integrating an i-Pad into his practice, and he is using the device to receive and to transmit information, and for note taking. He added that he was recently in a federal courthouse in the Midwest that prohibited members of the public from bringing their telephones past security.

4. Issues arising from the use of new technology. The Chair identified possible legal authorities that the Committee might consider, including Supreme Court Rule 122, the Arizona Code of Judicial Administration, recommended Arizona jury instructions, the Code of Judicial Conduct, and ethical rules for attorneys. Ms. Randall mentioned a “Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees” that was prepared by the federal Judicial Conference Committee on Codes of Conduct in April 2010. The packet is available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf>. The Chair then asked the members to identify issues involving the use of new media that the Committee might consider at future meetings.

The discussion turned to juries. If schools stop teaching cursive writing, which some have already done, will the court provide electronic devices to jurors for note taking? Who would “own” the notes in that circumstance? Would jurors be less likely to engage in robust note taking if there was a possibility that the court might not destroy their notes after trial? Will attorneys utilize data mining services to determine if jurors used social media sites to post information concerning a trial while it was in progress, and how would that impact post-verdict motions? How frequently and when should the court admonish jurors about not doing internet research, and will jurors follow the admonition? How effective are admonitions in preventing jurors from doing on-line research over the lunch hour, or at home? Should admonitions advise of potential financial (the cost of mistrial) or other consequences (contempt) if a juror fails to

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observe the admonition? What rights to due process would a juror have if the court contemplates a sanction for not following an admonition? Is it more productive for courts to provide jurors with Wi-Fi access than it is to prevent internet access, and if the court provides access, what responsibility does the court have for its misuse?

The members then discussed media. Should courts have different policies for journalists' use of social media and for social media use by other stakeholders? What is the differentiation between a blogger, a citizen blogger, and a journalist, and does Rule 122 apply to all of these, or only to some? Are there significant distinctions between professional "pool" cameras and images taken by individuals using i-Phones? Do judges have the inherent authority to prohibit the use of personal cameras in the courtroom, or should this be the subject of a rule? How should the court deal with special situations, such as taking images of someone who is in a witness protection program? Can an individual courtroom require additional screening for electronic devices in this situation or under other unique circumstances? Do journalists have fundamental rights to bring electronic devices into, and to transmit from, courtrooms? Do domestic relations or other case types require special rules regarding cameras, similar to Rule 122(a)'s provision concerning juvenile proceedings? Should there be prescribed consequences for disruptive use or misuse of electronic devices in court? If most court visitors have the ability to take digital video, how should the court prevent recording in the hallways or lobbies outside the courtrooms?

The members believed that Rule 122 contemplated the use of a single, tripod-mounted camera that would function as a pool for mass transmission. Dozens of individuals attempting to record images on personal electronic devices is a wholly different situation that could be as distracting and disruptive as paparazzi in the courtroom. Although transparency is generally positive, even one camera in the courtroom can affect the way court staff and judges behave. Cameras can embolden some witnesses, and make others more inhibited. Because a trial is a search for the truth, what is the best course of action?

The members also asked whether there should be a court rule concerning tweeting. Should the court allow witnesses to tweet? Can counsel tweet a court ruling, and is Ethical Rule 3.6 instructive on this question? When does tweeting prejudice a judicial proceeding? Should courts facilitate the use of Twitter for attorneys who may need to be in multiple courts at the same time?

Ms. Liewer advised the members that she had taken a photograph of the Committee earlier in the day, which she posted on her Facebook page and displayed for the members. No one in the meeting room knew that she had taken the photograph. What could therefore prevent members of the public from taking photos of judges or other participants in the courtroom? What measures are available to detect clandestine audio or video recordings during court proceedings? Will attempts be made to impeach official records of proceedings by introducing surreptitious recordings?

The members also discussed ethical issues involving attorneys as well as judicial officers. If there is no specific ethical constraint against an attorney looking up potential jurors on Facebook or Google, is it nevertheless unprofessional conduct? While the members have not seen potential

jurors use these sites to find background information on trial attorneys, there have been instances of jurors using these sites to research criminal defendants, and that is problematic. Does E.R. 3.5 cover situations where an attorney's use of social media may be tantamount to an ex parte communication with a judge? Some judges in Arizona are elected; is the use of social media proper in election campaigns? While some judges adopt bright line policies that no one who is a friend on Facebook can appear in their court, some judges have active Facebook pages at the time they take office; following such a bright line policy, especially in a small community, might be challenging.

5. Next steps. The Chair requested staff to organize the issues raised today for further discussion at the next meeting. The members then agreed to schedule the next meetings of this Committee for June 7, August 30, and September 28, 2012.

6. Call to the Public; Adjourn. There was no response to a call to the public. The meeting adjourned at 2:20 p.m.

The next meeting date is **Thursday, June 7, 2012.**